IN THE

Supreme Court of the United States

October Term, A. D. 1953

No. 209

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, *Petitioner*,

vs.

ARCHIE C. STUDE, WILLIAM LUMPKIN and POTTAWATTAMIE COUNTY, IOWA, *Respondents*.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, *Petitioner*,

vs.

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CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, *Petitioner*,

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ARCHIE C. STUDE and WILLIAM LUMPKIN, *Respondents*.

BRIEF OF RESPONDENT

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BRIEF OF RESPONDENT

STATEMENT OF THE CASE

These actions arise from the condemnation of a single tract of land by the Chicago, Rock Island & Pacific Railroad Company (hereinafter referred to as Railroad), in which the Railroad attempted two different appeals from the same award made by the State Condemnation Jury. The Railroad first attempted a direct appeal from the award to the United States District Court and then appealed from the same award to the State Court and attempted to remove that proceeding to the

United States District Court. The question presented is whether the Railroad is properly in the Federal Court either by the direct appeal or by the removal from the State Court. Archie C. Stude, owner of the fee in the land, and William Lumpkin, his tenant (hereinafter referred to as Landowners), contend that the proper method of invoking Federal Court jurisdiction would have been to file the action originally in the Federal Court under Rule 71A of the Federal Rules of Civil Procedure.

The substantive right of the Railroad is set forth in Chapter 471 of the Code of Iowa, 1950. This chapter, entitled "EMINENT DOMAIN," relates to condemnations generally. The preliminary procedure for the Railroad in the instant case is set forth in Sections 471.6, 471.9 and 471.10 of the Code of Iowa, 1950, and provides generally that the Railroad shall make application to the Iowa State Commerce Commission for permission to condemn. Section 471.10 concludes "the company shall have power to condemn the lands so certified by the Commission." This procedure was followed in the instant case and the Railroad was authorized by the Iowa Commerce Commission to condemn the lands in question (R. 5).

By an entirely separate chapter the *procedure* for condemnation in Iowa to enforce in the state courts the substantive rights of condemnation granted by Chapter 471 is set out. This is Chapter 472 of the Iowa Code of 1950 entitled, "PROCEDURE UNDER POWER OF EMINENT DOMAIN." This procedural chapter of the Iowa Code is applicable not only to railroads seeking to condemn by state proceedings but also to other condemnors. Thus Code of Iowa 1950, § 472.1, provides:

"The procedure for the condemnation of private property for works of internal improvement, and for other public uses and purposes, unless and except as otherwise provided by law, shall be in accordance with the provisions of this chapter."

The procedure to be followed in a condemnation case in the United States courts is prescribed by the Federal Rules of Civil Procedure, Rule 71A, 28 U. S. C. A., and subdivision (k) of Rule 71A specifically provides that the rule governs in actions involving the exercise of the power of eminent domain under the law of a state and that if the state law provides for trial of any issue by jury or of trial of the issue of compensation by jury or commission, or both, that provision shall be followed.

Alleging that theretofore it had been authorized by the Interstate Commerce Commission and had been granted authority to condemn by the Iowa State Commerce Commission, the Railroad on January 18, 1952, instituted condemnation proceedings before the Sheriff of Pottawattamie County, Iowa, in accordance with the provisions of Chapter 472, Code of Iowa, 1950, and filed a written application for condemnation of the private property of various persons, including land owned by Archie C. Stude and leased by William Lumpkin, respondents herein (R. 5-7). The sheriff appointed six resident freeholders of the county as a commission to assess and appraise damages (R. 7) and a notice of hearing before the commissioners was served on the landowners (R. 7, 9). A hearing was had before the Commissioners and they made their awards, including an award to Archie C. Stude in the amount of Twenty-three Thousand Eight Hundred Eighty-eight and 60/100ths Dollars ($23,888.60) and an

award to William Lumpkin in the amount of One Thousand and no/100ths Dollars ($1,000.00) (R. 7, 8).

The Railroad deposited the awards with the sheriff on February 23, 1952 (R. 18) and took possession of the land condemned under the procedure set forth in Section 472.25 of the Code of Iowa, 1950, which provides:

> "*Right to take possession of lands.* Upon the filing of the commissioners' report with the sheriff, the applicant may deposit with the sheriff the amount assessed in favor of a claimant, and thereupon the applicant shall, except as otherwise provided, have the right to take possession of the land condemned and proceed with the improvement. No appeal from said assessment shall affect such right, except as otherwise provided."

Under Iowa procedure, Chapter 472, Code of Iowa, 1950, the following sections provide that the award is final unless an appeal is taken:

> "Section 472.17. When appraisement final. The appraisement of damages returned by the commissioners shall be final unless appealed from.
>
> "Section 472.18. Appeal. Any party interested may, within thirty days after the assessment is made, appeal therefrom to the district court, by giving the adverse party, his agent or attorney, and the sheriff, written notice that such appeal has been taken."

On March 6, 1952, the Railroad attempted to appeal from the award of the sheriff's commissioners directly to the Federal Court by serving upon Landowners a "Notice of Appeal from Assessment of Damages" in the form prescribed by state procedure as set forth in Section 472.18, Code of Iowa, 1950 (R. 4), and docketing a complaint in the United States District Court (R. 4), and causing an

ordinary summons to be issued and served upon Landowners (R. 9). The notice prescribed by Rule 71A (d), Federal Rules of Civil Procedure, was not served.

Thereafter and on March 11, 1952, the Railroad served a Notice of Appeal to the appropriate State Court from the same award by the sheriff's commissioners (R. 47), and filed a petition of removal to the United States District Court (R. 48).

The United States District Court for the Southern District of Iowa, Western Division, Riley, J., sustained Landowners' motion to dismiss the complaint and overruled Landowners' motion to remand the removal case (R. 37-39; 107 F. Supp. 895).

The United States Court of Appeals for the Eighth Circuit affirmed the dismissal of the attempted direct appeal to the United States District Court and reversed the United States District Court's decision overruling the motion to remand, with directions to grant the motion and remand the cause (R. 87, 88; 204 Fed. 2d 116).

The Court of Appeals held that no right of appeal from the commissioners' award to the United States District Court is provided for in either the State Code or Rule 71A of the Federal Rules of Civil Procedure, and that the right of the Railroad to initiate the proceedings in the United States District Court was not before the court "for the simple reason that it did not do so * * *" (R. 86, 204 Fed. 122). As respects the removal, the Court of Appeals held that the decision of this court in *Mason City and Fort Dodge R. Co. v. Boynton*, 204 U. S. 570, 51 L. Ed. 629, 27 S. Ct. 321, was controlling since that decision involved the right of removal by parties to a

condemnation proceeding commenced under the procedural law of the State of Iowa. The Boynton case, supra, held that in an Iowa condemnation case the landowner is the defendant for purposes of removal. Therefore, the Court of Appeals held that the Motion to Remand should have been sustained.

Thereafter the Railroad filed a petition for rehearing with the Court of Appeals (R. 89-100) which was denied (R. 100-108; 204 F. 2d 954).

In the opinion of the Court of Appeals denying the Petition for rehearing the court emphasizes that the Railroad strictly followed the Iowa procedure for initiating the condemnation suit in the Iowa State courts and that no complaint was filed in the United States District Court until after an appeal was taken from the commissioners' award as required by the Iowa Procedural Statute. The court further held that the Railroad did not attempt to invoke the original jurisdiction of the Federal Court under Rule 71A of the Federal Rules of Civil Procedure (R. 101-107, incl.; 204 F. 2d 954).

SUMMARY OF ARGUMENT

Point I.

A railroad having a right to condemn land pursuant to the substantive law of a state, including Iowa, may proceed initially either in the State Court or in the Federal Court. If it proceeds under the state law, it must follow the state procedure, and if it proceeds in Federal Court, it must follow Rule 71A of the Federal Rules of

Civil Procedure. In this case the Railroad was not denied access to the federal courts. It did not proceed so as to invoke Federal Court jurisdiction.

Franzen v. Chicago, Milwaukee & St. Paul Railway Co., 7 Cir., 278 F. 370.

Mississippi, etc., River Broom Co. v. Patterson, 98 U. S. 403, 25 L. Ed. 206.

Searl v. School District, 124 U. S. 197, 41 L. Ed. 197, 41 L. Ed. 415, 8 S. Ct. 460.

Madisonville Traction Company v. St. Bernard Mining Company, 196 U. S. 239, 49 L. Ed. 462, 25 S. Ct. 251.

Mason City & Fort Dodge Railway Company v. Boynton, 204 U. S. 570, 51 L. Ed. 629, 27 S. Ct. 321.

Kohl v. United States, 91 U S. 367, 23 L. Ed. 449.

Code, Iowa, 1950, Chapter 471.

Code, Iowa, 1950, §§ 471.6, 471.9, 471.10.

Code, Iowa, 1950, Chapter 472.

Code, Iowa, 1950, §§ 472.3, 472.4, 472.8-472.13, 472.14, 472.17, 472.18, 472.21, 472.22, 472.25.

Federal Rules of Civil Procedure, Rule 71A, 28 U. S. C. A.

United States v. 137.82 Acres of Land in Cheshire County, 31 F. Supp. 723

Point II.

There can be no direct appeal to the United States District Court from an award of commissioners appointed by a County Sheriff to appraise damages in a condemnation proceeding instituted under a state condemnation procedural statute and a purported appeal from such an award to the United States District Court is ineffective and confers no jurisdiction in the court.

Franzen v. Chicago, Milwaukee & St. Paul Railway Co., 7 Cir., 278 Fed. 370.

Williams Livestock Company v. Delaware L. & W. R. Co., D. C. Pa., 285 Fed. 795.

California Prune & Apricot Growers Assn. v. Cats American Co., 9 Cir., 60 F. 2d 788.

Burford v. Sun Oil Co., 319 U. S. 315, 63 S. Ct. 1098, 87 L. Ed. 1424

Federal Rules of Civil Procedure, Rule 71A, 28 U. S. C. A.

Notes of Advisory Committee on Rules, 28 U. S. C. A. following Rule 71A.

Point III.

The Railroad failed to follow any of the procedural requirements of Rule 71A; therefore the District Court had no jurisdiction of the person or subject matter herein; and since the State Court first assumed jurisdiction of the res and subject matter herein, said State Court has exclusive jurisdiction.

United States v. Bank of New York & Trust Company, 296 U. S. 463, 56 S. Ct. 343, 80 L. Ed. 331.

Penn General Casualty Company v. Commonwealth, 294 U, S. 189, 558 S. Ct. 386, 79 L. Ed. 850.

Franzen v Chicago, M. & St. P. Ry. Co., 7 Cir., 278 Fed. 370

Havner v Hegnes (C. C. A. 8th, 1920), 269 Fed. 537.

Federal Rules of Civil Procedure, Rule 71A, 28 U. S. C. A.

Cartlidge v. Rainey, 160 F. 2d 841, cer. den. 69 S. Ct. 237, 235 U. S. 885, 93 L. Ed. 424.

Point IV.

A condemnor railroad appealing to a state district court from an award of commissioners, under a state procedural statute is not a "defendant" within the Federal Removal Statute, 28 U. S. C. A., § 1441.

Mason City & Fort Dodge Railroad Company v. Boynton, 1907, 204 U. S. 570, 51 L. Ed. 629, 27 S. Ct. 321.

Shamrock Oil & Gas Corporation v. Sheets, 313 U. S. 100, 85 L. Ed. 1214, 61 S. Ct. 868.

Kloeb v. Armour & Company, 311 U. S. 199, 85 L. Ed. 124, 61 S. Ct. 213.

Code, Iowa, 1950, §§ 472.14, 472.18, 472.20, 472.21.

28 U. S. C. A., §§ 1441(a).

ARGUMENT

Point I.

The Railroad could have exercised its right to condemn by instituting a proceeding in the Federal Court under Rule 71A, Federal Rules of Civil Procedure, but it failed to do so.

The Railroad contends that it has been deprived of its right of access to the federal courts. In examining this contention it is necessary to consider the nature and source of the action. In this connection it is conceded that the question is concerned with exercise of the statutory right or power known to the law of Eminent Domain. The *right* of the Railroad to condemn is governed by Chapter 471, Code of Iowa, 1950, which is entitled "EMINENT DOMAIN." The pertinent sections of this chapter granting to the Railroad the substantive right to condemn (Code of Iowa, 1950, Sections 471.6, 471.9, and 471.10) provide:

"471.6 *Railways.* Any railway, incorporated under the laws of the United States or of any state thereof, may acquire by condemnation or otherwise so much real estate as may be necessary for the location, construction and convenient use of its railway. Such acquisition shall carry the right to use for the construction and repair of said railway and its appurtenances any earth, gravel, stone, timber, or other material, on or from the land so taken."

"471.9. *Additional Purposes.* Any such corporation owning, operating, or constructing a railway may, by condemnation or otherwise, acquire lands for the following additional purposes.

* * * *

"3. For additional or new right of way * * * ."

"471.10. *Finding by commerce commission.* The company, before instituting condemnation proceedings under section 471.9, shall apply in writing to the Iowa State Commerce Commission, for permission to so condemn. Said commission shall give notice to the landowner, and examine into the matter, and report by certificate to the clerk of the district court in the county in which the land is situated, the amount and description of the additional lands necessary for such purposes, present and prospective, of such company; whereupon the company shall have power to condemn the lands so certified by the commission."

Under Section 471.10, Code of Iowa, 1950, the Railroad was granted the power to condemn. This vested the Railroad with a full and complete *substantive right* to acquire the land by condemnation. At that stage of the matter, the Railroad had the choice of electing to initiate its *proceedings* to condemn in the Federal Court under the applicable Federal rules or with the County

Sheriff under the applicable State rules, prescribed by Chapter 472 of the 1950 Code of Iowa.

The distinction between the right to condemn and the remedy for enforcement of the right is clear and fundamental. When the right of condemnation became vested, the railroad could pursue its remedy by whichever method it elected. This distinction is completely overlooked and entirely ignored by the railroad.

Eminent Domain and proceedings instituted for the enforcement of the right to take lands for specified purposes under statutes granting the substantive right to condemn, occupy a unique position in the law. A proceeding in Eminent Domain is "Sui Generis." 29 C. J. S. 1128, Eminent Domain Section 209, In re: South Carolina Public Service Authority, D. C. S. C., 37 F. Supp. 28, 30, Affirmed, C. C. A., Barnes v. South Carolina Public Service Authority, 120 F. 2d 439.

The exercise of the right of eminent domain is in effect a compulsory sale of the owner's interest in the property in which the individual's rights yield to consideration of the common welfare. 29 C. J. S. 777 Eminent Domain Section 2.

Condemnation proceedings are special proceedings adversary in their nature, ordinarily conducted by a temporary tribunal selected for the occasion and subject to judicial review and supervision. Some Courts have regarded the proceedings as proceedings at law, other Courts have regarded them as proceedings in equity. 29 C. J. S. 1128 Eminent Domain Section 209. Yet generally the pro-

ceedings are judicial and involve the exercise of judicial power. 29 C. J. S. 1129 Eminent Domain Section 209.

Since the proceedings are adversary in character no cogent reason exists for denying the jurisdiction of a Federal Court if the other judicial requisites are present. Under Federal Court decisions the Railroad could have and should have instituted its proceedings in the Federal Court at the outset, if it wished to invoke the jurisdiction of that Court.

In *Franzen v. Chicago, Milwaukee & St. Paul Railroad Company*, 7 Cir., 278 Fed. 370, the Court held that a condemnation proceeding authorized by the law of Illinois could be instituted in the federal court, as against the contention that the state court alone was authorized by the Illinois statute to try the issues arising out of the condemnation proceeding considered in that case, and hence the federal court had no jurisdiction of the action. The court considered that the question was settled by the decisions of this court in *Mississippi River Boom Co. v. Patterson*, 98 U. S. 403, 25 L. Ed. 206; *Searl v. School District*, 124 U. S. 197, 41 L. Ed. 415, 8 S. Ct. 460; *Madisonville Traction Co. v. The St. Bernard Mining Co.*, 196 U. S. 239, 49 L. Ed. 462, 25 S. Ct. 251; *Mason City and Ft. Dodge Railroad Co. v. Boynton*, 204 U. S. 570, 51 L. Ed. 629, 27 So. Carolina 321; *Kohl v. U. S.*, 91 U. S. 367, 23 L. Ed. 449. In the opinion the court said, l. c. 278 Fed. 371:

> "But defendants contend that the federal court cannot maintain an action to condemn; the state court alone being authorized by the Illinois statute

to try issues arising out of such proceedings. A very interesting and, we may add, able brief is submitted in support of this contention; but the question is closed by the decisions of the Supreme Court. (Citing cases)

"10 Ruling Case Law, 207, we think, correctly announces the law of these decisions to be:

> "'A judicial proceeding to take land by eminent domain and ascertain compensation therefor is a suit at common law within the meaning of the federal Judiciary Act; and when requisite diversity of citizenship exists such a suit may be brought in or transferred to the federal District Court of the district in which the land lies.'

"See, also, Nichols on Law of Eminent Domain (1917 Ed.), pp. 1040, 1041."

The Supreme Court cases cited in the Franzen case involved the propriety of removing condemnation proceedings from state to federal Court, and it was contended that they were not applicable for the reason that they did not involve the jurisdiction of the court in an initial proceeding. However the Circuit Court of Appeals in the Franzen case said, 278 Fed. 370, at page 372:

> "We fail, however, to appreciate the force of the distinction, for actions are removable only when they could, in the first instance, have been brought in the Federal Court."

In the case of *Kohl et al v. United States*, 91 U. S. 367, 23 L. Ed. 449, Mr. Justice Strong in determining that the exercise of the right of eminent domain constituted a suit at common law or in equity, stated at pages 375, 376 of 91 U. S., page 452 of 23 L. Ed.:

"If, then, a proceeding to take land for public uses by condemnation may be a suit at common law, jurisdiction of it is vested in the Circuit Court. That it is a 'suit' admits of no question." * * *

"When, in the 11th section of the Judiciary Act of 1789, jurisdiction of suits of a civil nature at common law or in equity was given to the Circuit Courts, it was intended to embrace not merely suits which the common law recognized as among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined as distinguished from rights in equity as well as suits in admiralty. The right of eminent domain always was a right at common law. * * * The time of its exercise may have been prescribed by statute but the right itself was superior to any statute. * * * It is difficult, then, to see why a proceeding to take land in virtue of the Government's eminent domain, and determining the compensation to be made for it, is not, within the meaning of the statute, a suit at common law, when initiated in a court. *It is an attempt to enforce a legal right.*" (Emphasis ours.)

To the same effect see *Beatty v. United States*, 4 Cir., 203, F. 620, 623.

Since the power to condemn became fixed and absolute upon authorization by the State Commerce Commission, there remained only the question as to where the proceeding should be initiated for the determination of the damages to be awarded to the landowners.

State Court Procedure

In Iowa, the *procedure* for the enforcement of the substantive right granted by Chapter 471, Code of Iowa, 1950, is delineated in Chapter 472 which is entitled "PROCEDURE UNDER POWER OF EMINENT DOMAIN."

It is there provided that condemnation proceedings shall be instituted by written application filed with the sheriff of the county in which the land sought to be condemned is located, and Section 472.3 prescribes the contents of such an application. Section 472.4 relates to the appointment of a commission by the sheriff of the county in which the land is located, which commission has the duty to assess damages. Sections 472.8 to 472.13, inclusive, relate to the notice of assessment required to be given by the applicant, the form of the notice and service thereof. Section 472.14 provides for the appraisement by the commissioners and the report, and Section 472.17 provides that the *appraisement of damages returned by the commissioners shall be final unless appealed from.* Section 472.18 relates to an appeal from the appraisement and provides as follows:

> "472.18 Appeal. Any party interested may, within thirty days after the assessment is made, appeal therefrom to the district court, by giving the adverse party, his agent or attorney, and the sheriff, written notice that such appeal has been taken."

Subsequent sections in Chapter 472 of the Code of Iowa, 1950 provide for the processing of the appeal and prescribe the rules to be followed in the *state* district court upon the taking of an appeal. It will be noted that the appeal is docketed in the name of the owner of the land as plaintiff and in the name of the applicant for condemnation as defendant (Section 472.21) and that thereafter a petition is filed by the landowner as plaintiff and an answer is filed by the applicant as defendant (Section 472.22). Section 472.25 provides as follows:

"472.25. Right to take possession of lands. Upon the filing of the commissioners' report, with the sheriff, the applicant may deposit with the sheriff the amount assessed in favor of a claimant, and thereupon the applicant shall, except as otherwise provided, have the right to take possession of the land condemned and proceed with the improvement. No appeal from said assessment shall affect such right, except as otherwise provided."

Federal Court Procedure

Due to the unique nature of condemnation proceedings and to the conflict in the procedural statutes of the various states with respect thereto, Rule 71A of the Federal Rules of Civil Procedure was adopted in 1951 to govern *exclusively* the procedure in the federal courts in such proceedings. Federal Rules of Civil Procedure, Rule 71A, 28 U. S. C. A.[1] This rule specifically sets out the procedure to be followed. It provides for the filing of a complaint in which the property to be condemned and at least one of the owners of some part of or interest in the property are named as defendants (Rule 71A (c) (1)). The contents of the complaint are prescribed in Rule 71A (c) (2). This provision of the rule also states that the court may order such distribution of a deposit as the facts warrant. Subsection (c) (3) relates to the filing of the complaint and extra copies thereof.

Subsection (d) of Rule 71A relates to process. It provides that upon the filing of the complaint plaintiff shall forthwith deliver to the clerk joint or several notices directed to the defendants designated in the complaint and that additional notices directed to defendants subsequently

1 Rule 71A is set out in full in Appendix.

added shall be so delivered. The delivery of the notice and its service have the same effect as delivery and service of summons under Rule 4 of the Federal Rules of Civil Procedure. Each notice is required to state the court, the title of the action, the name of the defendants to whom it is directed and that the action is to condemn property, a description of the property sufficient for identification, the interest to be taken, the authority for taking, the uses to which the property is to be put, and that defendant may serve upon the attorney for the plaintiff an answer within 20 days after service of the notice. The notice is required to conclude with the name of the attorney for the plaintiff and an address within the district in which the action is brought where he may be served. Other provisions of subsection (d) of Rule 71A relate to service of the notice and the return.

Subsection (k) of Rule 71A provides as follows:

> "(k) Condemnation under a State's Power of Eminent Domain. The practice as herein prescribed governs in actions involving the exercise of the power of eminent domain under the law of a state, provided that if the state law makes provision for trial of any issue by jury, or for trial of the issue of compensation by jury or commission or both, that provision shall be followed."

It is perfectly clear from the foregoing that the enforcement of the right granted by Chapter 471, Code of Iowa, 1950, is governed by Chapter 472, Code of Iowa, 1950, when the action to condemn is initiated by filing a written application with the sheriff of the county in which the land to be condemned is situated. It is also perfectly clear that the enforcement of such right is governed by Rule 71A of the Federal Rules of Civil Procedure when the action to condemn is initiated in the federal court.

The adoption of Rule 71A did not affect the jurisdiction of United States District Courts with regard to condemnation actions. The rule merely provides a uniform method of condemnation procedure in federal courts. The Railroad seeking to condemn Iowa land for railroad purposes, had the same rights, the same choice of forum, before the effective date of Rule 71A as it had thereafter. The fact that under state practice a matter is first decided in an administrative proceeding does not mean that the enforcement of the same substantive right cannot be determined in the federal court by filing a civil action therein.

As heretofore pointed out in the *Kohl* and *Franzen* cases, supra, the enforcement of the right of eminent domain is a suit cognizable by the federal courts.

In the case of *United States v. 137.82 Acres of Land in Cheshire County,* D. C. N. H., 31 F. Supp. 723, the government filed a petition in federal court to condemn certain lands in New Hampshire for flood control purposes. The defendant landowners filed a motion to dismiss alleging lack of jurisdiction in the court for the reason that the procedure did not conform to that prescribed by the statutes of New Hampshire which provided for a petition to the selectmen of the town for an assessment of damages with a right of appeal from the award to the superior court of the county. The question presented was whether the method of procedure prescribed by the New Hampshire statutes was exclusive and such as to deprive the federal court of its jurisdiction in proceedings for the condemnation of New Hampshire land.

In upholding its jurisdiction, the court referred to old title 28 U. S. C. A., Section 41 (1), which now appears as 28 U. S. C. A. 1331, relating to the jurisdiction of the district court over all suits of a civil nature brought by the United States, and stated at page 726 of 31 F. Supp.:

> "Condemnation of land is not a criminal proceeding or a suit in admiralty. It is an action of a civil nature and the act above cited vests jurisdiction in the District Courts."

The Iowa procedural statute does not and cannot in any way limit or restrict the jurisdiction of the federal court. In the case of *Mexican Central Railway Co. v. Pinkney*, 149 U. S. 194, 13 Sup. Ct. 859, 37 L. Ed. 699, Mr. Justice Jackson, speaking for the court, stated:

> "The jurisdiction of the circuit courts of the United States has been defined and limited by Congress and can be neither restricted nor enlarged by statutes of the state."

Under Rule 71A a uniform method of procedure in condemnation proceedings in federal court has been prescribed and must be followed. Subsection (k) of Rule 71A specifically embraces this proceeding.

The Railroad had the right to condemn and the remedy was not and could not be limited to the filing of application with the sheriff. The Railroad had a choice of forum—state or federal. That it chose state procedure to enforce its substantive right of condemnation was not the fault of the Landowners.

It is stated by the Railroad that the Court of Appeals for the Eighth Circuit held that the Railroad was

precluded from invoking the jurisdiction of the United States District Court. This, we respectfully submit, was not the holding of the Court of Appeals. In its opinion, 204 Fed. 2d 116, at page 122 the court states:

> "The question of whether the Rock Island could have initiated the proceedings in the United States District Court is not before us for the simple reason that it did not do so and hence the propriety of such action is not presented. We express no opinion on that subject."

It is apparent, from the argument set forth in Divisions I and II, pages 15 through 26 of the Railroad's brief, that the Railroad has confused the question of a right which will give rise to a cause of action in the Federal Courts, and the designation of a particular state procedural remedy as a civil action.

All of the cases cited by the Railroad in this connection involve removal proceedings and deal with the question of whether an action instituted under a state procedural statute has reached a stage where it can be regarded as a "civil action" for the purpose of removing the case to the Federal Courts. None of these cases state or constitute authority for the proposition that a cause of action resulting from the vesting of the right of Eminent Domain could not be instituted in the Federal Court as an original proceeding. The cases merely hold that if the procedure prescribed by the state statute for the enforcement of the right, provides a preliminary inquest in the nature of an administrative inquiry, and, if the condemnor initiates that inquiry before a state officer or officers, the proceedings conducted before such officers or board are not in the nature of a "civil action,"

but that when an appeal from such proceedings is lodged in a state court the proceedings become, for the first time, a civil action within the meaning of the removal statute.

The Railroad concedes that the state cannot circumscribe, limit or enlarge the jurisdiction of the Federal Court and on page 22 of its brief, it quotes from the opinion of this Court in *Searl v. School District*, 124 U. S. 197, 31 L. Ed. 415:

> "* * * The appointment of commissioners to ascertain the compensation is only one of the modes by which it's to be determined. The proceeding is therefore, a suit at law from the time of the filing of the petition and the service of process upon the defendant."

United States v. 157.82 Acres of Land in Cheshire County, D. C. N. H., 31 F. Supp. 723, previously discussed on page 18 of this brief, adequately answers the Railroad's contention in this regard. In that case it was held that condemnation of land is an action of a civil nature and that state method of procedure was not exclusive. It was further held that the Federal Court would follow as near as possible the state procedure in the Federal Court as required by the conformity laws. See also, *Kohl v. United States*, 91 U. S. 367, 28 L. Ed. 449.

As we have pointed out, the right of eminent domain, as distinguished from the procedural remedy, is clear and distinct. When the Railroad became vested with the right to condemn under Chap. 471 of the Code of Iowa, 1950, it could have instituted its proceeding to condemn by filing a petition in the United States District Court. The state could not limit and did not attempt to limit the jurisdiction of the Federal Courts in

this respect. Under Rule 71A, Federal Rules of Civil Procedure, the United States District Court would have been obligated to appoint or to have appointed commissioners for the purpose of making a preliminary determination of the damages as was done in the Searl case, supra, after the action had been removed. It is clear that the court has such a right and duty. It is also clear that the conduct of such proceedings in the Federal Court in no way affects the jurisdiction of that court. The Railroad's contention that such a preliminary determination is a condition precedent to the jurisdiction of the Federal Court is clearly without merit and is contrary to the established legal precepts as set forth in the decisions heretofore referred to.

In *Myers v. C. & N. W. R. R. Co.*, 118 Ia. 312, 91 N. W. 1076, the Supreme Court of Iowa at page 1079 of 91 N. W. states:

> "The mode adopted in instituting a suit cannot be regarded of controlling importance. The uniform holding has been that procedure prescribed by the state for its own courts cannot deprive the federal courts of their original jurisdiction."

And again at page 1080 of 91 N. W.:

> "The jurisdiction of the federal courts cannot be made to depend upon formal or modal matters; otherwise it would be in the power of the states to defeat that jurisdiction entirely by hostile legislation hedging about the commencement of suits by a statutory procedure, which could not be employed in the federal courts." (Citing cases.)

The Railroad commenced the enforcement of its right by filing an application with the sheriff. That it was dis-

satisfied with the award made by the sheriff's commissioners and wished then to invoke the jurisdiction of the United States District Court, is no justification for transfer of the case to federal court, nor does it give force to the Railroad's assertion that it has been deprived of its right to initiate its proceeding in the federal court.

Point II.

The Federal Court has no jurisdiction of the Railroad's appeal from the commissioners' awards.

In determining whether the district court has jurisdiction of the Railroad's appeal from the awards of the sheriff's commissioners, it is the well-settled rule that the presumption, on direct attack, is again the jurisdiction of a federal court in a particular case, until the contrary affirmatively appears. *Norton v. Larney,* 266 U. S. 511, 69 L. Ed. 413, 45 S. Ct. 145; *McNutt v. General Motors Acceptance Corp.*, 298 U. S. 178, 80 L. Ed. 1135, 56 S. Ct. 780.

The Railroad cites no authority in support of the jurisdiction of the United States District Court to entertain appeals from state proceedings of this nature.

The Railroad in the present instance, after becoming vested with the substantive right to condemn, elected to follow state procedure in the enforcement of the right to the point where an award was made, and, then, appealed to the Federal Court. At the time of the purported appeal the Railroad had paid into the sheriff's office the amount of the awards and had taken possession of the lands and proceeded with the new construction.

We find authority neither in statute nor in precedent for the attempted appeal from the award of the sheriff's commissioners to the United States Court. The Iowa statutes clearly contemplate only an appeal to the District Court of the State of Iowa and in any event the state statutes could not govern federal proceedings. See *Franzen v. Chicago, Milwaukee & St. Paul Ry. Co.*, 278 Fed. 370. Likewise, the applicable Federal Rules make no provisions for any appeal to the Federal District Court from an award made in state proceedings. The Federal Rules *clearly contemplate that if a condemnation case is to be maintained in the federal court it must be instituted in that court or be properly removed there.* If cannot be started as a state proceeding and appealed to the federal court.

The provision of subsection (k) of Rule 71A that "if the state law makes provision for trial of any issue by jury, or the trial of the issue of compensation by jury, or commission or both, that provision shall be followed," contemplates, we respectfully submit, only that if a trial by commission and jury is prescribed by the state law then the litigant in a federal court proceeding is likewise entitled to trial by commission and jury. It does not contemplate use of state procedure and state process to the point of giving notice of appeal; it does not authorize an appeal to the federal court from the award of the sheriff's commissioners.

The procedure to be followed in a federal court condemnation proceedings is set out in Rule 71A, Federal Rules of Civil Procedure, 28 U. S. C. A. The rule specifies that a complaint shall be filed and designates the contents thereof. Rule 71A (c) (2). It further prescribes

the notice to be given and the manner and effect of the service thereof.

The Railroad did not follow the procedure set forth in Rule 71A, and we respectfully sumbit that the obvious and only method of invoking federal court jurisdiction of condemnation proceedings is to commence the action in the federal court as provided in Rule 71A. Subdivision (k) of Rule 71A specifically relates to condemnation under state substantive law, as follows:

> *(k) Condemnation under a State's Power of Eminent Domain.* The practice as herein prescribed governs in actions involving the exercise of the power of eminent domain under the law of a state, provided that if the state law makes provisions for trial of any issue by jury, or for trial of the issue of compensation by jury or commission or both, that provision shall be followed."

Prior to the promulgation of Rule 71A, and under the older conformity statutes, the federal courts in condemnation proceedings followed the state practice insofar as possible. This resulted in great confusion, especially so since a particular state often had several statutes involving condemnation and it was difficult to determine which statute of a particular state should be followed in substance in a particular federal proceeding. That was the primary reason for the promulgation of Rule 71A. *But even under the old conformity procedure the federal courts did not go so far as to sanction a proceeding part state and part federal in nature.*

It is manifest from an examination of the notes of the Advisory Committee on Rules found in the United States Code Annotated following Rule 71A, that the rule

was designed to effectuate a uniform method of procedure in condemnation proceedings initiated in federal court, whether the substantive right being enforced arises from federal or state law. The Committee described the previous practice under the conformity system as "atrocious," and their report discloses conclusively that an applicant for condemnation who proceeds in the federal court under authority of a state statute must follow the procedure prescribed by Rule 71A with the condition only that if state law prescribes trial by jury or by commission or by both, then the litigants in the federal court are entitled to the same method of trial. The following excerpts from the report indicate the purpose and scope of the rule:

> "The Advisory Committee have given more time to this rule, including time required for conferences with the Department of Justice to hear statements of its representatives, than has been required by any other rule. The rule may not be perfect but if faults develop in practice they may be promptly cured. Certainly the present conformity system is 'atrocious.' 28 U. S. C. A. following Rule 71 A, pocket part, page 98.
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> "Rule 71 A affords a uniform procedure for all cases of condemnation invoking the national power of eminent domain, and, to the extent stated in subdivision (k), for cases invoking a state's power of eminent domain; and supplants all statutes prescribing a different procedure." 28 U. S. C. A. following Rule 71 A, pocket part, pages 102, 103.
>
> "*Note to Subdivision (h).* This subdivision prescribes the method of determining the issue of just compensation in cases involving the federal power of eminent domain. The method of jury trial provided by subdivision (h) will normally apply in cases in-

volving the state power by virtue of subdivision (k)." 28 U. S. C. A. following Rule 71 A, pocket part, page 104.

"*Note to Subdivision (k).* While the overwhelming number of cases that will be brought in the federal courts under this rule will be actions involving the federal power of eminent domain, a small percentage of cases may be instituted in the federal court or removed thereto on the basis of diversity or alienage which will involve the power of eminent domain under the law of a state. See Boom Co. v. Patterson, 1878, 98 U. S. 403, 25 L. Ed. 206; Searl v. School District No. 2, 1888, 8 S. Ct. 460, 124 U. S. 197, 31 L. Ed. 415; Madisonville Traction Co. v. Saint Bernard Mining Co., 1905, 25 S. Ct. 251, 196 U. S. 239, 49 L. Ed. 462. In the Madisonville case, and in cases cited therein, it has been held that condemnation actions brought by state corporations in the exercise of a power delegated by the state might be governed by procedure prescribed by the laws of the United States, whether the cases were begun in or removed to the federal court. See, also, Franzen v. Chicago, M. & St. P. Ry. Co., C. C. A. 7th, 1921, 278 F. 370, 372.

"Any condition affecting the substantial right of a litigant attached by state law is to be observed and enforced, such as making a deposit in court where the power of eminent domain is conditioned upon so doing. (See also subdivision (j).) Subject to this qualification, subdivision (k) provides that in cases involving the state power of eminent domain, the practice prescribed by other subdivisions of Rule 71 A shall govern." 28 U. S. C. A. following Rule 71 A, pocket part, page 105.

There is nothing in the rule to justify an assumption that the present proceeding is excepted from its scope and application, and to permit an exception in this instance would be contrary to the very purpose for which

it was promulgated. If each litigant desiring to condemn is entitled to place his own interpretation on the rule depending upon the circumstances in which he finds himself, then the rule is a mere shadow of form, without substance. The uniformity which it was designed to achieve would be lost and a system more atrocious than the rule of conformity would develop.

Rule 71A does not grant, nor does it purport to grant, any remedy which did not exist for the enforcement of the right of condemnation before its enactment. No right of appeal from a state proceeding to the federal court existed before its enactment and none exists as a result of its enactment.

The proper procedure for the Railroad to have followed in the instant case, if the Railroad was desirous of maintaining it in the Federal Court, is disclosed by an examination of prior federal decisions. In *Franzen v. Chicago, Milwaukee & St. Paul Ry. Co.*, 7 Cir., 278 Fed. 370, the Circuit Court of Appeals for the Seventh Circuit held that the Illinois condemnation statute, requiring the jurors to be selected from the freeholders of the county and regulating the number of challenges, did not govern a condemnation action in the federal courts, as the state legislature was not authorized and did not intend to prescribe for federal courts a practice in conflict with the Judicial Code, Section 287 and other Federal Statutes. In the instant case, the Iowa Code, Chapter 471, gives a substantive right to condemn and the railroad might proceed to condemn either in the state court of Iowa or the federal court, *but if the condemnation is in the state court the railroad must follow the proceedings outlined by the Iowa*

statutes and if the condemnation is in the federal court the provisions of Rule 71 A of the Federal Rules of Civil Procedure govern and must be followed. The United States District Court has no jurisdiction to entertain a so-called appeal from the decision of commissioners who are appointed pursuant to and under state law.

The Railroad in the present instance seeks to invoke the jurisdiction of the United States District Court through a procedural remedy of appeal provided by Chapter 472, Code of Iowa, 1950, which provides (Section 472.1):

> "Procedure provided. The procedure for the condemnation of private property for works of internal improvement, and for other public uses and purposes, unless and except as otherwise provided by law, shall be in accordance with the provisions of this chapter."

That the statute of Iowa above cited is procedural is beyond question. The only court having jurisdiction over such an appeal in the first instance is the state court. No jurisdiction could be vested in the federal court by the state procedural statute. The United States District Court has no appellate jurisdiction in this instance. The state cannot invest such jurisdiction and Congress has not done so.

There are many cases involving the exercise of the power of eminent domain by the United States in the various states where the courts under the conformity acts followed state practice as far as possible. If a right to trial by jury or jury and commissions was provided under the state procedure, the federal court permitted trial by similar tribunals but in no instance did the court follow the state practice to the point of having the appraisers appointed by the same officer who would ap-

point them under state court practice. The federal court in these cases appointed the commissioners itself, or ordered the United States marshal to do so. See *Central Neb. Public Power & Irr. District v. Harrison*, 8 Cir., 127 Fed, 588; *United States v. Dillman*, 5 Cir., 146 F. 2d 572; *United States v. 40,558 acres of land in Newcastle County, Delaware*, 62 Fed. Supp. 98; *United States v. 16,572 acres of land*, D. C. S. D. Texas, 49 Fed. Supp. 555; *United States v. 18,236 acres of land in Franklin, Pennsylvania*, 63 Fed. Supp. 665; *United States v. 1010.8 acres of land in Sussex County, Delaware*, 77 Fed. Sup. 529; *United States v. 17,280 acres of land more or less, situated in Saunders County, Nebraska*, 47 Fed. Supp. 267; *United States v. 250 acres of land in Nueces County, Texas*, 43 Fed. Supp. 937; *United States v. 266.25 acres of land in Charleston County, South Carolina*, 43 Fed. Supp. 633; *United States v. Federal Land Bank of St. Paul*, 8th Cir., 127 F. 2d 505.

Williams Livestock Company v. Delaware, L. & W. R. Co., D. C. Pa., 285 Fed. 795, illustrates the point we make. Under the Pennsylvania statute there involved, the right to condemn arose after posting bond (in this case the right arose upon securing permission of the Iowa State Commerce Commission under Section 471.10, Code of Iowa, 1950). In the Pennsylvania case the first step in condemnation was appointment of viewers (here it is appointment of commissioners). In that case it was held by the Federal Court that the provisions of the statute requiring the viewers appointed to assess damages for land condemned, on a petition filed in a court "of this Commonwealth" to be chosen from a board selected by the Court of Common Pleas of the county, and

that they shall meet at the place designated by such Court, be governed by its rules and orders and report to it, *were not applicable when the petition was filed in the federal court* which was required to conform to the state court practice as near as might be. The court held that the viewers would be appointed by the court and that the court would not make its selection of viewers from the county board appointed by the judge of the Court of Common Pleas of the county. The court said that the state statute did not attempt to limit the action of the federal court and that if it did so, the selection and appointment of the viewers would be that of the state and not of the federal court.

That the federal court has no jurisdiction to enforce a remedy provided for by state statute is well established. In *California Prune & Apricot Growers Association v. Cats American Company*, 9 Cir., 1932, 60 F. 2d 788, 790, which involved a special arbitration procedure provided by state statute, wherein a dispute as to certain contractual rights and obligations was involved, the court said:

> "It is undoubtedly true that a federal court in proper cases may enforce state laws; but this principle is applicable only when the state legislation invoked, creates or establishes a substantive or general right."
>
> * * * * *
>
> "The law that controls in the matter of the remedy is the law of the forum and no other. The federal courts are without jurisdiction or power to enforce a purely remedial or procedural state law."

And, quoting from *Chelentis v. Luckenbach Steamship Company, Inc.*, 247 U. S. 372, 379, 384, 38 S. Ct. 501, 504, 62 L. Ed. 1171, the court said:

> "* * * 'the only difference between a proceeding in one court or the other would be that the remedy would be regulated by the lex fori' * * * 'The distinction between rights and remedies is fundamental. A right is a well founded or acknowledged claim; a remedy is the means employed to enforce a right or redress an injury. Bouviers Law Dictionary.'"

We respectfully submit that the only procedure to follow in order to invoke the jurisdiction of the federal court in condemnation is that outlined in Rule 71A of the Federal Rules of Civil Procedure. The rule is couched in mandatory terms. It provides what an applicant "shall" do to invoke jurisdiction. Rule 71A, having been promulgated by this court, having been transmitted to Congress by the Chief Justice of the United States, and Congress having taken no action thereon within the prescribed time, became effective on August 1, 1951, as provided in the order of this court, 28 U. S. C. A. Section 2072. Rule 71A has the force and effect of law and its "regulation must be regarded as complete and exclusive, inhibiting what it does not allow, as well as governing what is fixed by positive appointment." *The Sloop Merchant*, D. C. New York, Abb. Adm. 1, 17 Fed. Cas. No. 9, 434. See also: *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. Ed. 23; *Sibbach v. Wilson & Co.*, 312 U. S. 1, 85 L. Ed. 479, 61 S. Ct. 422; *Kellman v Stoltz*, D. C. Ia., 1 F. R. D. 726; *Austin v. Riley*, 55 Fed. 833.

As Rule 71A is exclusive and as it does not provide for an appeal from state condemnation proceedings to

the federal court, but does provide a method of procedure directly in the federal court with guarantee of trial by commission and jury if that is permitted in the state court, the purported appeal to the United States District Court was without effect. The Railroad did not elect to institute federal court condemnation proceedings. It could not invoke the jurisdiction of the federal court by the procedure it attempted to follow in these proceedings.

The Court of Appeals in its decision below (204 F. 2d 120, 122) clearly inveighs against any such appellate jurisdiction when it says:

> "The short and simple answer to the Rock Island's contention that it had the right of direct appeal from the commissioners' award to the federal court is that there was no right of appeal from the commissioners' award to the federal court provided for in the state Code and Rule 71 A confers none. No such right exists."

The Railroad recognized the questionable nature of its appeal to federal court; hence it also appealed to the state district court and then attempted to remove that proceeding to the federal court. That its efforts in both instances were contrary to the law is no excuse for a claim that it has been deprived of access to the federal courts. The decision as to forum was the Railroad's, but it was a decision to be made initially. It could not later be changed to meet what the Railroad might deem the exigencies of its case.

It is evident from the assertions made by the Railroad in the last four divisions of its brief that it fails to recognize the fundamental difference between a right and a remedy. As heretofore pointed out, the Rail-

road concedes that the state would have no right to limit the jurisdiction of the federal court. Yet no Railroad, in its argument, takes the position in the first instance that the state, by prescribing a procedural remedy by commissioners for the enforcement of a vested right, has precluded the federal court from taking initial cognizance of the enforcement of that right. Then the Railroad takes the paradoxical position that the same state procedural statute, by providing for an appeal to the state district court, cannot deprive the federal court of its jurisdiction of that appeal.

In attempting to rationalize this inconsistency the Railroad states that the notice of appeal to the United States District Court was not really a notice of appeal at all but merely the fulfillment of a condition imposed by the state procedural statute as a condition prerequisite to invoking the jurisdiction of the federal court. It is manifest that if there was a civil action created for the first time when the commissioners made their award, then no condition could be imposed by the state statute as a condition to bringing that action into federal court. On the other hand, if no civil action was created when the commissioners made their award then no civil action could be created by an appeal to the federal court because no appellate jurisdiction exists in the federal court whether from an administrative award or otherwise.

In support of its contention the Railroad relies on several workmen's compensation cases. We respectfully submit that these compensation cases cited by the Railroad afford no authority for its contention that it may

appeal from the commissioners' award to the federal court. The compensation cases are readily distinguished.

In a few states there is no appeal from the board or commission in a workmen's compensation case. But the parties have a substantive right to file an *independent action* to set aside the award of the board, and that right, it is held, may be exercised in either the state or the federal court, whichever first obtains jurisdiction. Of course there is no cause of action to set aside an award of an induistrial accident board or commission until the award is made. It is then that the *substantive right* sought to be enforced arises.

In the instant case we respectfully submit, the substantive right exists by virtue of the Iowa Code, Chapter 471. All the prerequisites of the cause of action sought to be enforced by the Railroad existed before the Railroad filed the application in the sheriff's office. That application was merely the first step in the enforcement of the cause of action by state proceedings. Condemnation proceedings before the sheriff with appeal to the state district court are procedural steps prescribed by Chapter 472 of the Iowa Code. They pertain to state proceedings; they have nothing to do with federal procedure.

In states where administrative proceedings are set up to administer rights provided by the compensation law and an appeal to the state court from an award of the commission is provided, a compensation case cannot, after the administrative determination, be filed in or removed to federal court. This is discussed in *Flowers v. Aetna Casualty & Surety Co.*, 163 F. 2d 411, cited by the Railroad.

No logical reason is advanced as to why the Railroad should be permitted to follow state procedure, and then if dissatisfied with the award to invoke the jurisdiction of the federal court. The Railroad had the initial choice of exercising its substantive right to condemn in either the federal or the state forum.

It is admitted by the Railroad that Rule 71A must be followed, but the Railroad says that before it can follow the federal procedure it must first follow the state procedure. Such contention is not supported by citation of authority and none exists. Rule 71A is clear upon its face and was specifically drafted for the purpose of eliminating conflict or confusion as to the procedure to be followed in federal court in condemnation matters.

The case of *Burford v. Sun Oil Co., et al*, 319 U. S. 315, 63 S. Ct. 1098, 87 L. Ed. 1424, relied on by Railroad, involved entirely different principles which are not applicable here. In that case an action was commenced in equity in the federal court to set aside an order of a Texas commission granting a permit to drill oil wells. A comparable situation in this case would have been presented if an equitable action had been commenced to set aside the order of the Iowa State Commerce Commission authorizing petitioner to condemn the lands here involved. The case involved herein is an appeal from an award and does not attempt to set aside the award. This distinction is set forth in the Burford case as follows:

> "There is some argument that the action is an 'appeal' from the State Commission to the federal court since an appeal to a State Court can be taken under relevant Texas statutes; but of course the Texas legislature may not make a federal district

court, a court of original jurisdiction, into an appellate tribunal or otherwise expand its jurisdiction, and the Circuit Court of Appeals in its decision correctly viewed this as a simple proceeding in equity to enjoin the enforcement of the Commission's order." (63 S. Ct. at page 1099.)

Thus in the *Burford* case, supra, the action was commenced in equity to set aside an order of the State Commission on the ground that the order was a denial of due process of law. The instant case involves merely a review of the amount of the award by the sheriff's commission and is in no sense a separate cause of action to set aside an order.

Point III.

The District Court was without jurisdiction as to the person and subject matter.

Even if the Railroad were otherwise properly before the federal court under the complaint, the courts below properly dismissed the complaint for the further reasons that the notices required by Rule 71A were not served and the State district court first obtained jurisdiction of the res or subject matter and therefore has exclusive jurisdiction.

As previously noted, Rule 71A of the Federal Rules of Civil Procedure, which became effective on August 1, 1951, sets forth the procedure for condemnation actions brought in the United States district courts. Subdivision (d) thereof provides for a Notice to be served upon Landowners, and sets out the contents of the Notice and the manner of the service thereof. Subdivisions (1) and (2) of said Subdivision (d) of Rule 71A provide as follows:

"(1) Notice: Delivery. Upon the filing of the complaint the plaintiff shall forthwith deliver to the clerk joint or several notices directed to the defendants named or designated in the complaint. Additional notices directed to defendant subsequently added shall be so delivered. The delivery of the notice and its service have the same effect as the delivery and service of the summons under Rule 4.

"(2) Same: Form. Each notice shall state the court, the title of the action; the name of the defendant to whom it is directed, that the action is to condemn property, a description of his property sufficient for its identification, the interest to be taken, the authority for the taking, the uses for which the property is to be taken, that the defendant may serve upon the plaintiff's attorney an answer within 20 days after service of the notice, and that the failure so to serve an answer constitutes a consent to the taking and to the authority of the court to proceed to hear the action and to fix the compensation. The notice shall conclude with the name of the plaintiff's attorney and an address within the district in which action is brought where he may be served. The notice need contain a description of no other property than that to be taken from the defendants to whom it is directed."

The Railroad did not follow the procedure above set forth. It followed the state court procedure and served a "Notice of Appeal from Assessment of Damages" as provided by Section 472.18, Code of Iowa, 1950, and, after the compalint was filed, caused a copy of the complaint together with an ordinary summons to be served upon the Landowner. The notice prescribed by Rule 71A (d) which should have been served does not require the defendants to appear, whereas the summons served by the Railroad purported to require the defendants to appear.

It is fundamental that questions of procedure in the federal courts are governed by the Federal Rules of Civil Procedure, and Rule 71A (a) specifically provides that the Rules of Civil Procedure before the United States District Court govern the procedure for the condemnation of real property under the power of eminent domain, except as otherwise provided in the Rule.

The Landowners respectfully submit that there has been absolutely no compliance with subsection (d) of Rule 71A, and the "Brief of Petitioner" does not contend that the Railroad complied with the express requirements of Rule 71A. As the Railroad has failed to show any reason for not complying with Rule 71A and as there has been no compliance with said Rule, and particularly with reference to the process required by the Rule, Landowners submit that the United States District Court is without jurisdiction of the person of the Landowners.

Furthermore, the United States District Court acquired no jurisdiction of the res or subject matter of the proceedings. The State District Court first acquired jurisdiction of the subject matter and that jurisdiction is exclusive.

After the appraisement of damages by the Pottawattamie County Sheriff's Commissioners, and before any attempted appeal was taken, the Railroad deposited the amount of the award with the sheriff. The state statutes do not require the making of the deposit as a prerequisite to the appeal. The state statutes provide under Section 472.25 of the Code of Iowa, 1950, that if the applicant for condemnation deposits the amount assessed in favor of a claimant, the applicant shall have the right

to take possession of the land condemned and proceed with the improvements. Section 472.28 of the Code of Iowa, 1950 provides that the sheriff shall hold the deposit until the appeal is finally determined. In other words, the Railroad followed the state procedure set forth in Chapter 472 of the Code of Iowa in depositing the money with the sheriff. Said deposit is by state statute specifically made subject to an appeal to the state district court.

Chapter 472 of the Code of Iowa further provides that the assessment as determined on appeal shall be certified to by the clerk of the District Court and upon being furnished with a copy the Sheriff may remove the condemnor unless the amount of the assessment is paid. Chapter 472 further provides that the clerk of the district court shall file certain records pertaining to the appeal and the payments received and paid out in the condemnation suit. Therefore it is clear that the appeal to the state district court related to the deposit made with the sheriff and the state district court obtained jurisdiction over the res or subject matter in that the state district court assumed control over the deposit made and the possession which was thereby granted to the Railroad under state law.

If the Railroad had properly commenced the action in the federal court in the first instance the land would have been required to be made the defendant under Rule 71A (c) (1), and thereby the federal court would have obtained jurisdiction of the subject matter. Furthermore, subdivision (j) of Rule 71A provides for a deposit in the federal court and the notes of the advisory committee

to subdivision (j) indicate that this subdivision shall apply where substantive state law permits the making of a deposit in order to obtain possession. Therefore, if the action had properly been commenced in the federal court in the first instance the land would have been named defendant and the deposit would have been made in the federal court.

Obviously, both the state court and the federal court cannot have jurisdiction over the same res or subject matter involved herein. The Railroad proceeded under state procedure before the sheriff's commissioners and made the deposit under state procedure with the state sheriff. The Iowa statute specifically provides that such a deposit shall be held pending an appeal to the state district court.

It must also be noted that the state sheriff who holds the deposit was neither named nor served with process as a party to the appeal sought to be lodged in the federal court. He is not an officer of the federal court and has no statutory authority for holding the deposit subject to an attempted appeal to the federal court. The state law provides in the procedural chapter, Chapter 472, that the sheriff, after the appeal is finally determined, shall pay the amount of the award to the clerk of the state district court and the clerk shall then compute the costs, including the costs of the condemnation jury (Section 472.33) and file a written record in the office of the County Recorder (Section 472.36). The sheriff would have no authority in the instant case for delivering the money to the Clerk of the United States District Court since by Statute the Sheriff is holding the deposit pending the appeal to the State district court.

In *Cartlidge vs. Rainey*, 5 Cir., 1948, 160 F. 2d 841, cer. den. 69 S. Ct. 237, 235 U. S. 885, 93 L. Ed. 424, a Texas sheriff seized certain whiskey under the Texas Liquor Control Act. A suit was first instituted in the federal court seeking to enjoin the forfeiture by the State and thereafter a suit was instituted in the Texas state court seeking the forfeiture of the materials seized. The Court of Appeals held that even though the State suit was filed after the federal suit, the jurisdiction of the state court related to the time of the seizure which was prior to the filing of the action in the federal court and that therefore the state court had jurisdiction in rem of the very property that was sought to be recovered in the suit in the federal court.

In *United States vs. Bank of New York & Trust Company*, 296 U. S. 463, 80 L. Ed. 331, 56 S. Ct. 343, the New York Superintendent of Insurance held funds belonging to Russian insurance companies under an order of the New York state court, and it was held that since the New York state courts first assumed jurisdiction of the res, the Federal District Court was without jurisdiction in a suit by the United States for an accounting and delivery of funds. In the course of the opinion the Court states at page 447 of 296 U. S.:

> "The principle, applicable to both federal and state courts, that the court first assuming jurisdiction over property may maintain and exercise that jurisdiction to the exclusion of the other, is not restricted to cases where property has been actually seized under judicial process before a second suit is instituted. It applies as well where suits are brought to marshal assets, administer trusts, or liquidate estates, and in suits of a similar nature, where, to give effect

to its jurisdiction, the court must control the property. Farmers' Loan & Trust Co. v. Lake Street Elevated R. Co., 177 U.S. 51, 61, 20 S. Ct. 564, 44 L. Ed. 667. If the two suits are in rem or quasi rem, so that the court must have possession or control of the res in order to proceed with the cause and to grant the relief sought, the jurisdiction of one court must of necessity yield to that of the other. Penn General Casualty Company v. Pennsylvania, 294 U.S. 189, 195, 55 S. Ct. 386, 79 L. Ed. 850."

Also in *Penn General Casualty Company vs. Commonwealth*, 294 U.S. 189, 79 L. Ed. 850, 55 S. Ct. 386, where a receivership action was first commenced in the Federal Court, it was held that the State could not thereafter obtain jurisdiction over the property, since the Federal Court had first assumed jurisdiction over the res.

The proposition is also discussed in *Franzen vs. Chicago, M. & St. P. Ry. Co.*, 7 Cir., 278 Fed. 370, where a plea of abatement was entered in the Federal Court. The Court states that the fact that a proceeding was also pending in the State Court would not bar the action. However, the Court adds, pages 372 of 278 F.:

"A different situation would have existed had a state court, in first taking jurisdiction of the cause of action, also taken possession of the res."

In a later case, *Havner v. Hegnes* (8 Cir., 1920), 269 Fed. 537, the Court of Appeals held that where a suit was commenced in the Federal Court for receivership, that court acquired constructive possession of the property to the exclusion of a subsequent action commenced in the Iowa State Court.

The Railroad contends that the cause of action alleged in its complaint is an original action within the

original jurisdiction of the district court. The Railroad cannot with consistency contend that the federal court has jurisdiction or control over the deposit made with the sheriff since by state statute the deposit is to be held pending an *appeal*. It follows that the state courts obtained jurisdiction over the deposit by reason of the appeal to the state district court.

Point IV.

The Railroad was not the "Defendant" within the federal removal statute, in taking an appeal from the commissioners' condemnation awards to the Iowa District Court, and therefore the Railroad is precluded from removing the state court appeal to the federal court.

As previously indicated in our "Statement of the Case" herein, the Railroad, following its attempt to appeal directly from the award of the commissioners to the United States District Court, docketed an appeal from the same award to the state court of Iowa and immediately attempted to remove that action to the United States District Court. The district court, while sustaining the Landowners' Motion to Dismiss the Complaints in the direct appeal case, overruled the Landowners' Motion to Remand the removal case (R. 37-39; 107 F. Supp. 895). The United States Court of Appeals for the Eighth Circuit affirmed the dismissal of the attempted direct appeal to the United States District Court and reversed the decision of the United States District Court overruling the Motion to Remand, with directions to grant the Motion and remand the cause (R. 87, 88; 204 F. 2d 116).

On the removal question, the Court of Appeals held that the decision of this Court in *Mason City & Fort Dodge Railroad Company v. Boynton*, 204 U. S. 570, 51 L. Ed. 629, 27 S. Ct. 321, was controlling since that decision involved the right of removal by parties to a condemnation proceeding commenced under the procedural law of the State of Iowa.

The ruling of the district court on the Motion to Dismiss the direct appeals by the Railroad from the commissioners' awards was before the Court of Appeals on the appeal of the Railroad from the judgment of dismissal and the Order denying the Motion to Remand the removal case, which involved the same award of the sheriff's commissioners, was before the Court of Appeals on the Landowners' Cross-Appeal. The appeals were submitted as one case and under the circumstances the Court of Appeals properly reviewed the Order denying the Motion to Remand, although such an Order, standing alone, would not be appealable. See *Deckert v. Independence Shares Corp.*, 311 U. S. 282, 85 L. Ed. 189, 61 S. Ct. 229; *Mayflower Industries v. Thor Corp., et al.*, 3 Cir., 1950, 184 F. 2d 537; *Goldwyn Picture Corp. v. Howells Sales Co.*, 2 Cir., 1923, 287 F. 100; *Johnson v. Butler Bros.*, 8 Cir., 1947, 162 F. 2d 87; *Gray, McFawn & Co. v. Hegarty, Conroy & Co.*, 2 Cir., 1936, 85 F. 2d 516.

See also the opinion of the Court of Appeals in this case, R. pages 79 and 80 and footnote 2 on page 80, 204 F. 2d at page 118 and footnote 2 on pages 118 and 119.

We proceed to a consideration of the question of the propriety of the removal by the Railroad to the United

States District Court of the action which had been docketed by the Railroad in the state court.

Section 472.21, Code of Iowa, 1950, relating to an appeal to the Iowa district court from an award of the sheriff's commissioners, provides:

> "Appeals—how docketed and tried. The appeal shall be docketed in the name of the owner of the land, or of the party otherwise interested and appealing, as plaintiff, and in the name of the applicant for condemnation as defendant, and be tried as in an action by ordinary proceedings."

The Railroad in the present instance took an appeal from the award of the commissioners to the district court of Iowa in and for Pottawattamie County, at Avoca. Inasmuch as it is the applicant for condemnation, it would, under Iowa procedural law, Section 472.21, above, be docketed as defendant in the state court. The question now considered is whether the Railroad is entitled to remove the appeal from state to federal court under Section 1441 (*a*) of Title 28 U. S. C. A. which provides:

> "Section 1441. *Actions removable generally.*
>
> "(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State Court of which the district courts of the United States have original jurisdiction, may be removed by the *defendant* or the defendants to the district court of the United States for the district and division embracing the place where such action is pending." (Emphasis ours.)

The Landowners respectfully urge that the Railroad is the *plaintiff* in these proceedings, and, as such, is not entitled to remove. The Railroad apparently contends in this Court that if it may not maintain in the United States

District Court the action involving its direct appeal to that court from the award of the sheriff's commissioners, it may remove to such court the appeal it took to the state district court from the same award.

We respectfully call particular attention to the trend of the decisional law in restricting and limiting the jurisdiction of the federal courts on removal. See and compare *American Fire & Casualty Co. v. Finn*, 341 U. S. 6, 95 L. ed. 702, 71 S. Ct. 534. Under the express language of the removal statute the plaintiff in a proceeding is never entitled to remove to federal court a case it instituted in the state court. And even in doubtful cases removal from state to federal courts should be denied. *American Fire & Casualty Company v. Finn*, supra. See also: *Breyman v. Pennsylvania O. & D. R. Co.*, 6 Cir., 38 F. 2d 308.

In determining those instances in which suits may be removed, the removal statute has always been strictly construed and uniformly applied regardless of local law. This principle is amply illustrated in *Shamrock Oil & Gas Corporation v. Sheets*, 313 U. S. 100, 85 L. ed. 1214, 61 S. Ct. 868, and *Kloeb v. Armour & Company*, 311 U. S. 199, 85 L. Ed. 124, 61 S. Ct. 213. In the Shamrock case the plaintiff instituted his action in a state court, the amount involved being insufficient to invoke the jurisdiction of the federal court. Thereafter, the defendant filed a counterclaim, and the sum therein prayed for exceeded the requisite amount necessary to invoke the jurisdiction of the federal court. The plaintiff then sought to remove the entire cause to the federal court contending that he became a defendant when the counterclaim was filed. In

denying the contention, this court speaking through Mr. Justice Stone said, at page 104 of 313 U. S.:

> "Petitioner argues that although nominally a plaintiff in the state court it was in point of substance a defendant to the causes of action asserted in the counterclaims upon which, under Texas procedure, judgment could go against the plaintiff in the full amount demanded. (Citing cases.) But at the outset it is to be noted that decision turns on the meaning of the removal statute and not upon the characterization of the suit or the parties to it by state statutes or decisions. Mason City & Ft. D. R. Co. v. Boynton, 204 U. S. 570, 51 L. Ed. 629, 27 S. Ct. 321. The removal statute which is nationwide in its operation, was intended to be uniform in its application, unaffected by local law definition or characterization of the subject matter to which it is to be applied. Hence, the Act of Congress must be construed as setting up its own criteria, irrespective of local law, for determining in what instances suits are to be removed from the state to the federal courts."

The principle applied in the Sheets case finds its basis in a sound, logical conclusion that a party may not initiate an action under state procedure and then remove the case to federal court.

The question of the right of the Railroad to remove the appeal taken by it pursuant to the Iowa statute is not one of first impression. This court has determined the precise point adversely to the contentions of the Rock Island.

In *Mason City & Fort Dodge Railroad Company v. Boynton*, 1907, 204 U. S. 570, 51 L. Ed. 629, 27 S. Ct. 321, it was held that the landowner must be deemed to be the defendant in an Iowa condemnation proceeding as re-

spects right of removal to the federal court on the ground of diverse citizenship.

In the Boynton case the landowner appealed from the assessment and then removed the case to the federal court. The Railroad contended that such removal was improper since the landowner was not the defendant within the federal removal statute. In rejecting this contention and upholding the landowner's right to remove, the court, speaking through Mr. Justice Holmes, said:

"The question to be decided now is only whether the removal in this case can be upset on the ground that it was asked by the wrong party. The railroad company relies upon the words of the Iowa Code, § 2009, quoted above, and upon a decision of the Supreme Court of the state in a case like the present, except that the railroad was a foreign company, in which it was held that the railroad had a right to remove. Myers v. Chicago & N. W. R. Co., 118 Iowa 312, 324, 91 N. W. 1076. See also Kirby v. Chicago & N. W. R. Co., 106 Fed. 551. It is said that this court is bound by the construction given to the state law by the state court. Indeed, the above § 2009 does not need construction; it enacts, in terms, that the landowner shall be plaintiff. As the right to remove a suit is given only to the defendants therein, being nonresidents of the state, it is argued that the state decision ends the case.

"But this court must construe the act of Congress regarding removal. And it is obvious that the word 'defendant' as there used is directed toward more important matters than the burden of proof or the right to open and close * * *

"It is said the proceedings only become a case, within the meaning of the act of Congress, after the preliminary assessment and the appeal, and that then the landowner is in the position of one demanding

pay for property which he has lost. If we take a general view of the Iowa statutes, this conclusion is not correct. The railroad might have taken the appeal. If it had, the landowner would have been on the defensive in endeavoring at least to uphold the assessment, but he would have been called the plaintiff none the less. Whichever party appeals, it is not true that the landowner is seeking pay for what he has lost. By § 2011 the railroad is free to decline to take the property if it thinks the price too large. Even if, as in this case, it deposits the amount first assessed with the sheriff, the latter is not to pay it over until the determination of the appeal. § 2010. * * * Against the will of the owner the title to the land is not acquired until the case is decided and the price paid. The intent of railroad to get the land is the mainspring of the proceeding from beginning to end, and the persistence of that intent is the condition of their effect. The state is too considerate of the rights of its citizens to take from them their land in exchange for a mere right of action. The land is not lost until the owner is paid. Therefore, in a broad sense, the railroad is the plaintiff, as the institution and continuance of the proceedings depend upon its will. Hudson River R. & Terminal Co. v. Day, 54 Fed. 545."

In the light of the decision in the *Boynton* case there can be no doubt that *the Railroad in the present instance is a plaintiff* and that, as such, it had no right of removal. The *Boynton* case is cited and relied on to sustain the position of this Court in the *Shamrock* case, supra. The law as announced in the *Boynton case* is, we respectfully submit, controlling. In the face of that decision and the comparatively recent decision of this Court in the *Shamrock* case, supra, the Railroad's contention that it was entitled to remove its state court appeal is completely dispelled. See also *State of Minnesota*

v. Chicago, Milwaukee, St. Paul & Pacific R. Co., D. C. Minn., 4th Div., 1931, 50 F. 2d 430; *Rock Island Motor Transit Co. v. Murphy Motor Freight Lines*, D. C. Minn., 3rd Div., 1952, 101 F. Supp. 978. These district court decisions reiterate the precept that one seeking relief in a state tribunal or pursuant to state procedure is always a plaintiff and thus can never remove to the federal court.

In the present case the Railroad initiated the proceeding to condemn in the first instance; it also initiated the appeal from the assessment. The intent of the Railroad in this case to get the land is the mainspring of the proceedings; clearly it is the plaintiff and not the defendant within the removal law.

That the determination of the status of a party as a "defendant" within the removal statute presents a question of federal law without regard to the state statutes or decisions is recognized by the Railroad in Section III B of its brief. Indeed it argues in that section that it is the plaintiff. See page 37 of the "Brief of Petitioner." Manifestly the Railroad cannot be both a plaintiff and a defendant in the same condemnation proceeding. The Railroad admits it is a plaintiff in certain divisions of its brief. In others it says it is a "defendant" within the removal statute. This inconsistent position is apparent throughout the Railroad's brief.

In Division V of the Railroad's brief at pages 40 and 41 the Railroad argues:

> "We have already pointed out in an earlier division of this brief that petitioner was entitled to invoke the jurisdiction of the United States District

> Court either as plaintiff or defendant. It seems to us quite fundamental that if petitioner was properly denied access to the United States District Court because it was not a proper party plaintiff, that then it necessarily follows that it had a right of removal from the state court to the federal court because it was a defendant in the proceeding. * * * "

The above language of the Railroad's brief is based upon the false postulate that the Railroad was denied access to the United States District Court and that the reason for the denial was that it was not a proper party plaintiff. As a matter of fact, the Railroad was not denied access to the federal courts, it merely failed properly to invoke the jurisdiction of such courts. As previously indicated herein, the Railroad instituted a proceeding under the state procedural law and, following a verdict of the commissioners, notices of appeal to both the federal and state courts were filed by it. Neither by the direct appeal to federal court nor by the removal proceedings was federal jurisdiction invoked. In any event, the admissions in the Railroad's brief are entirely sufficient to defeat any contention that it makes in some portions thereof that it became a "defendant" within the removal statute, in the actions which it instituted in the state court by appealing thereto from the awards of the commissioners.

In urging error of the Court of Appeals in ruling on the removal question, the Railroad in Section V of its brief, at pages 41 and 42 thereof, attempts to distinguish the Boynton decision from the case presently considered, and states (incorrectly, we respectfully submit) that in this case the Railroad acquired title and possession of the land involved in the administrative pro-

ceeding before the Sheriff of Pottawattamie County, Iowa. Thus, the railroad argues that the necessity for the railroad to acquire title, referred to by Mr. Justice Holmes in his decision in the Boynton case, as the "mainspring of the proceeding" is no longer the paramount issue for determination and the status of the railroad becomes that of a defendant.

The substance of the supposed distinction is, then, that the railroad has paid the award to the sheriff thereby entitling it to the right of occupancy. We respectfully submit that this is exactly what happened in the *Boynton* case, and that there is in these cases in fact no distinction at all except that in the *Boynton* case the Landowner appealed to the state district court, and here the Railroad itself took that appeal. In the *Boynton* case the condemnor had also paid the award to the sheriff. In the statement of that case, at page 573 of 204 U. S., page 630 of 51 L. ed., it is said:

> "* * * On February 18, 1902, the commissioners were duly appointed by the sheriff and made their report assessing the owners' damages occasioned by the appropriation of his lots by the railroad company at $4,750.
>
> *"On the same day the railroad company paid the sheriff that amount of money for the use of the owner.*
>
> "Afterwards, and within the time fixed by the state statute, the owner appealed from the commissioners' awards to the District Court of Carroll County. * * *" (Emphasis ours.)

And in his opinion, Mr. Justice Holmes clearly recognized that the award had been paid to the sheriff, for he states at page 579 of 204 U. S. and page 633 of 51 L. Ed.:

> "Even if, as in this case, it deposits the amount first assessed with the sheriff, the latter is not to pay it over until the determination of the appeal."

Clearly there is no distinction between the *Boynton* case and this case nor a misconstruction of the Boynton decision by the Court of Appeals, as suggested by the Railroad.

Here, as in the Boynton case, the railroad acquired right of occupancy, *not title*, by depositing the money with the sheriff. As so tersely stated by Mr. Justice Holmes in the Boynton opinion at page 580 of 204 U. S., page 634 of 52 L. Ed.:

> "The state is too considerate of the rights of its citizens to take from them their land in exchange for a mere right of action."

For an interesting discussion of the removal question see comment on the District Court's opinion in the present case in 38 Iowa Law Review, 575-580.

The argument of the Railroad on the removal question is in direct conflict with other sections of its brief wherein it not only admits but urges that its position in these proceedings is that of a plaintiff rather than a defendant. Surely it cannot seriously contend that a plaintiff is entitled to remove its own case from the forum it selected in which to maintain it.

CONCLUSION

Reduced to simplicity, this case involves the question whether the Railroad has proceeded in such a manner as to invoke the jurisdiction of the federal court—not whether it has been denied access thereto. As succinctly stated

by Judge Collet in the opinion of the Court of Appeals denying the Petition for Rehearing herein, R. 102, 103, 204 F. 2d at pages 954, 955:

> "It may well be that if this action had been commenced in the United States District Court, that court would have had jurisdiction. But actions are not initiated in the federal courts by filing with a sheriff a request that he appoint commissioners to assess damages."

Proceedings before the sheriff are not a condition to the right to condemn. They are a procedural part of a state condemnation action. Iowa Code 1950, Chapter 472 is the general procedural chapter for condemnation in the state courts, whether the substantive right to condemn is granted by Chapter 471 or by some other statute of Iowa. (See, for example, Code 1950, Secs. 297.6, 420.52, 420.60, 420.156, 468.1 and 468.7.) Chaper 472 is in no sense tied in with Chapter 471 so as to condition the right to condemn on a proceeding before the Sheriff. The right is entirely independent of the procedural remedy to enforce it.

The Railroad made no attempt to institute an action in the federal court initially, nor to follow Rule 71A which, by specific mandate of this Court in subsection (k) thereof, is exclusively applicable in federal condemnation proceedings commenced by authority of substantive state law. The mere filing of a complaint in the federal court, in connection with the attempted appeal to that court, added nothing to the case of the Railroad. The complaint was neither intended nor filed as a separate action and there was no compliance whatever with Rule 71A as re-

quired to invoke original federal jurisdiction of person and res.

The attempted removal was entirely abortive and did not bring the state court case into federal cognizance. The Railroad voluntarily acted under state procedural law and deliberately invoked the jurisdiction of the district court of Iowa by filing the Notice of Appeal to that court. It follows that the Railroad may not now complain that it has been denied the right to have its cause determined in federal court through removal proceedings or otherwise.

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APPENDIX

The complete text of Rule 71A of the Federal Rules of Civil Procedure follows:

Rule 71A. Condemnation of Property

(a) Applicability of Other Rules. The Rules of Civil Procedure for the United States District Courts govern the procedure for the condemnation of real and personal property under the power of eminent domain, except as otherwise provided in this rule.

(b) Joinder of Properties. The plaintiff may join in the same action one or more separate pieces of property, whether in the same or different ownership and whether or not sought for the same use.

(c) Complaint.

(1) Caption. The complaint shall contain a caption as provided in rule 10(a), except that the plaintiff shall name as defendants the property, designated generally by kind, quantity, and location, and at least one of the owners of some part of or interest in the property.

(2) Contents. The complaint shall contain a short and plain statement of the authority for the taking, the use for which the property is to be taken, a description of the property sufficient for its identification, the interests to be acquired, and as to each separate piece of property a designation of the defendants who have been joined as owners thereof or of some interest therein. Upon the commencement of the action, the plaintiff need join as defendants only the persons having or claiming an interest in the property whose names are then known, but prior to any hearing involving the compensation to be paid for a piece of property, the plaintiff shall add as defendants all persons having or claiming an interest in that property whose names can be ascertained by a reasonably diligent search of the records, consid-

ering the character and value of the property involved and the interests to be acquired, and also those whose names have otherwise been learned. All others may be made defendants under the designation "Unknown Owners." Process shall be served as provided in subdivision (d) of this rule upon all defendants, whether named as defendants at the time of the commencement of the action or subsequently added, and a defendant may answer as provided in subdivision (e) of this rule. The court meanwhile may order such distribution of a deposit as the facts warrant.

(3) Filing. In addition to filing the complaint with the court, the plaintiff shall furnish to the clerk at least one copy thereof for the use of the defendants and additional copies at the request of the clerk or of a defendant.

(d) Process.

(1) Notice; Delivery. Upon the filing of the complaint the plaintiff shall forthwith deliver to the clerk joint or several notices directed to the defendants named or designated in the complaint. Additional notices directed to defendant subsequently added shall be so delivered. The delivery of the notice and its service have the same effect as the delivery and service of the summons under Rule 4.

(2) Same; Form. Each notice shall state the court, the title of the action, the name of the defendant to whom it is directed, that the action is to condemn property, a description of his property sufficient for its identification, the interest to be taken, the authority for the taking, the uses for which the property is to be taken, that the defendant may serve upon the plaintiff's attorney an answer within 20 days after service of the notice, and that the failure so to serve an answer constitutes a consent to the taking and to the authority of the court to proceed to hear the action and to fix the compensation. The notice shall conclude with the name of the plain-

tiff's attorney and an address within the district in which action is brought where he may be served. The notice need contain a description of no other property than that to be taken from the defendants to whom it is directed.

(3) Service of Notice.

(i) Personal Service. Personal service of the notice (but without copies of the complaint) shall be made in accordance with Rule 4(c) and (d) upon a defendant who resides within the United States or its territories or insular possessions and whose residence is known. The provisions of Rule 4(f) shall not be applicable.

(ii) Service by Publication. Upon the filing of a certificate of the plaintiff's attorney stating that he believes a defendant cannot be personally served, because after diligent inquiry within the state in which the complaint is filed his place of residence cannot be ascertained by the plaintiff or, if ascertained, that it is beyond the territorial limits of personal service as provided in this rule, service of the notice shall be made on this defendant by publication in a newspaper published in the county where the property is located, or if there is no such newspaper, then in a newspaper having a general circulation where the property is located, once a week for not less than three successive weeks. Prior to the last publication, a copy of the notice shall also be mailed to a defendant who cannot be personally served as provided in this rule but whose place of residence is then known. Unknown owners may be served by publication in like manner by a notice addressed to "Unknown Owners."

Service by publication is complete upon the date of the last publication. Proof of publication and mailing shall be made by certificate of the plaintiff's attorney, to which shall be attached a printed copy of the published notice with the name and dates of the newspaper marked thereon.

(4) Return; Amendment. Proof of service of the notice shall be made and amendment of the notice or proof of its service allowed in the manner provided for the return and amendment of the summons under Rule 4(g) and (h).

(e) Appearance or Answer. If a defendant has no objection or defense to the taking of his property, he may serve a notice of appearance designating the property in which he claims to be interested. Thereafter he shall receive notice of all proceedings affecting it. If a defendant has any objection or defense to the taking of his property, he shall serve his answer within 20 days after the service of notice upon him. The answer shall identify the property in which he claims to have an interest, state the nature and extent of the interest claimed, and state all of his objections and defenses to the taking of his proerty. A defendant waives all defenses and objections not so presented, but at the trial of the issue of just compensation, whether or not he has previously appeared or answered, he may present evidence as to the amount of the compensation to be paid for his property, and he may share in the distribution of the award. No other pleading or motion asserting any additional defense or objection shall be allowed.

(f) Amendment of Pleadings. Without leave of court, the plaintiff may amend the complaint at any time before the trial of the issue of compensation and as many times as desired, but no amendment shall be made which will result in a dismissal forbidden by subdivision (i) of this rule. The plaintiff need not serve a copy of an amendment, but shall serve notice of the filing, as provided in Rule 5(b), upon any party affected thereby who has appeared and, in the manner provided in subdivision (d) of this rule, upon any party affected thereby who has not appeared. The plaintiff shall furnish to the clerk of the court for the use of the defendants at least one copy

of each amendment, and he shall furnish additional copies on the request of the clerk or of a defendant. Within the time allowed by subdivision (e) of this rule a defendant may serve his answer to the amended pleading, in the form and manner and with the same effect as there provided.

(g) Substitution of Parties. If a defendant dies or becomes incompetent or transfers his interest after his joinder, the court may order substitution of the proper party upon motion and notice of hearing. If the motion and notice of hearing are to be served upon a person not already a party, service shall be made as provided in subdivision (d) (3) of this rule.

(h) Trial. If the action involves the exercise of the power of eminent domain under the law of the United States, any tribunal specially constituted by an Act of Congress governing the case for the trial of the issue of just compensation shall be the tribunal for the determination of that issue; but if there is no such specially constituted tribunal any party may have a trial by jury of the issue of just compensation by filing a demand therefor within the time allowed for answer or within such further time as the court may fix, unless the court in its discretion orders that, because of the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice, the issue of compensation shall be determined by a commission of three persons appointed by it. If a commission is appointed it shall have the powers of a master provided in subdivision (c) of Rule 53 and proceedings before it shall be governed by the provisions of paragraphs (1) and (2) of subdivision (d) of Rule 53. Its action and report shall be determined by a majority and its findings and report shall have the effect, and be dealt with by the court in accordance with the practice, prescribed in paragraph (2) of subdivision (e) of Rule 53. Trial of all issues shall otherwise be by the court.

(i) Dismissal of Action.

(1) As of Right. If no hearing has begun to determine the compensation to be paid for a piece of property and the plaintiff has not acquired the title or a lesser interest in or taken possession, the plaintiff may dismiss the action as to that property, without an order of the court, by filing a notice of dismissal setting forth a brief description of the property as to which the action is dismissed.

(2) By Stipulation. Before the entry of any judgment vesting the plaintiff with title or a lesser interest in or possession of property, the action may be dismissed in whole or in part, without an order of the court, as to any property by filing a stipulation of dismissal by the plaintiff and the defendant affected thereby; and, if the parties so stipulate, the court may vacate any judgment that has been entered.

(3) By Order of the Court. At any time before compensation for a piece of property has been determined and paid and after motion and hearing, the court may dismiss the action as to that property, except that it shall not dismiss the action as to any part of the property of which the plaintiff has taken possession or in which the plaintiff has taken title or a lesser interest, but shall award just compensation for the possession, title or lesser interest so taken. The court at any time may drop a defendant unnecessarily or improperly joined.

(4) Effect. Except as otherwise provided in the notice, or stipulation of dismissal, or order of the court, any dismissal is without prejudice.

(j) Deposit and Its Distribution. The plaintiff shall deposit with the court any money required by law as a condition to the exercise of the power of eminent domain; and, although not so required, may make a deposit when permitted by statute. In such cases the court and attorneys shall expedite the pro-

ceedings for the distribution of the money so deposited and for the ascertainment and payment of just compensation. If the compensation finally awarded to any defendant exceeds the amount which has been paid to him on distribution of the deposit, the court shall enter judgment against the plaintiff and in favor of that defendant for the deficiency. If the compensation finally awarded to any defendant is less than the amount which has been paid to him, the court shall enter judgment against him and in favor of the plaintiff for the overpayment.

(k) Condemnation Under a State's Power of Eminent Domain. The practice as herein prescribed governs in actions involving the exercise of the power of eminent domain under the law of a state, provided that if the state law makes provision for trial of any issue by jury, or for trial of the issue of compensation by jury or commission or both, that provision shall be followed.

(l) Costs. Costs are not subject to Rule 54(d).

Effective Date. Par. 2 of Supreme Court Order adopted April 30, 1951, 71 S. Ct. XIII (XVIII), which promulgated this rule and abrogated par. (7) of Rule 81(a) of these rules, provided: "That this Rule 71A and the amendment to Rule 81(a) will take effect on August 1, 1951. Rule 71A governs all proceedings in actions brought after it takes effect and also further proceedings in actions then pending, except to the extent that in the opinion of the court its application in a particular action pending when the rule takes effect would not be feasible or would work injustice, in which event the former procedure applies."

Such order, setting out this rule and providing for the abrogation of par. (7) of Rule 81(a), was transmitted to Congress on May 1, 1951 by the Chief Justice of the United States (House Document No. 121, May 1, 1951, 82nd Cong., 1st Sess.), in conformity with section 2072 of this title. As no action was taken by Congress within the 90-day period required by that section, this rule and the abrogation of par. (7) of Rule 81(a) took effect on August 1, 1951, as provided in said order.